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Supreme Court of the United States

OCTOBER TERM, 1951

No. 535

MERVYN J. LOBEL,

Petitioner,

against

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JAY LEO ROTHSCHILD,
Attorney for Petitioner.

INDEX

	PAGE
Petition	1
Jurisdiction	1
Opinion Below	2
Questions Presented	2
Reasons Relied Upon for Allowing the Writ	2
Conclusion and Prayer	8
Brief	9
Statement	9
The Decision of the Court of Appeals	10
The Charge	10
Argument	14
POINT I—Assuming that the law applicable was that of New York, the charge of the court was in strict accord with it, as shown by an unbroken line of decisions of the New York Court of Appeals, both before and after the *Foltis* decision, upon which the U. S. Court of Appeals relied, but in misapprehension of its purport and effect	14
POINT II—The issue with respect to the New York policy as to whether it would apply the Indiana law of *res ipsa*, may be deemed open. But whatever indications there are, are to the effect that New York would apply Indiana law. The question being undecided, and defendant having taken no exception on the point, the U. S. Court of Appeals should have considered the proposition on principle, and, in any event, on such an issue—in the absence of distinct exception—should not have reversed the District Court	28

PAGE

POINT III—There having been no appropriate exception by the defendant upon the point on which the U. S. Court of Appeals thought there was error, there should not have been any reversal of the judgment of the District Court 33

Conclusion 34

CASES CITED

Beinhocker v. Barnes Development Corp., 296 N. Y. 925 18
Bressler v. N. Y. R. T. Corp., 270 N. Y. 409 24

Century Indemnity v. Arnold (C. A. 2), 153 F. 2nd 531, 534 13
Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 ..... 6, 30
Cunningham v. Dady, 191 N. Y. 152, 157 23

Dittiger v. Isal Realty Corp., 290 N. Y. 492 ....14, 15, 16, 17

Erie R. Co. v. Murphy (C. A. 2), 9 F. 2nd 525, 526, 527 26
Erie v. Tompkins, 304 U. S. 64 .....2, 4, 5, 6, 7, 8, 30, 31

Fitzpatrick v. International Ry. Co., 252 N. Y. 127 .... 4, 30
Foltis v. City of New York, 287 N. Y. 108 ....3, 5, 14, 15, 17, 20, 21, 22, 23, 24, 26, 28, 29

Galbraith v. Busch, 267 N. Y. 230 .....16, 23, 24
Griffen v. Manice, 166 N. Y. 188 23
Griffin v. New York Central R. R. Co., 277 App. Div. 320 .....3, 6, 17, 18, 26, 27, 28

Hallett v. Stanley Stores, etc., 301 N. Y. 698, 276 A. D. 386 19
Helvering v. Stuart, 317 U. S. 154, 164 33
Hilton v. Bender, 69 N. Y. 75, 82 21

PAGE

Indianapolis Street R. Co. v. Schmidt, 163 Ind. 360.. 32

Judd v. Sams, 270 App. Div. 981; aff'd 296 N. Y. 801 .....28, 29
Justice v. Lang, 52 N. Y. 323, 329 20

Kraljer v. Snare (C. A. 2), 221 F. 255 26

Lachman v. Pennsylvania Greyhound Lines, 160 F. 2nd (C. A. 4) 496 .....3, 4, 29, 30, 31
Lessig v. N. Y. C. R. R. Co., 271 N. Y. 250 24
Lincoln v. French, 105 U. S. 614, 617 21

Manley v. New York Telephone Co., 303 N. Y. 18 24
Matter of Findlay, 253 N. Y. 1, 7 21
Matter of Magna v. Hegeman Harris Co., 258 N. Y. 82, 84 5
Matter of Matthews, 143 App. Div. 561, 562 21
McNulty v. Ludwig & Co., 153 App. Div. 206, 212 .. 20
Milio v. Railway Motor Trucking Co., 257 App. Div. 640, 642 18
Mullen v. St. John, 57 N. Y. 567 23

Nickisch v. Madison 34th Street Corp., 295 N. Y. 833..15, 17
Neuhoff v. Retlaw Realty Corp., 289 N. Y. 293 ..15, 18, 24

O'Gara v. Eisenlohr, 38 N. Y. 296, 303 21

Palmer v. Hoffman, 318 U. S. 109, 119 34
Peo. ex rel. Wellington Apts. v. Miller, 288 N. Y. 31, 33 5
People ex rel. Woronoff v. Mallon, 222 N. Y. 456, 464-5 20
Plumb v. Richmond, etc., 233 N. Y. 285 .....3, 5, 13, 21, 24, 25, 29, 33

Salomone v. Yellow Taxi Corp., 242 N. Y. 251 .....21, 24
Schroeder v. City & County Savings Bank of Albany, 293 N. Y. 370 .....14, 15, 16

PAGE

Schulz v. Finn, 273 App. Div. 780 28
Slater v. Barnes, 241 N. Y. 284, 287 24
Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. (D.C., Dist. of Col.) 940 .....3, 29, 31
Sweeney v. Erving, 228 U. S. 233, 240 .....22, 23, 26, 29
Swift v. Tyson, 16 Pet. 1 8

Terre Haute, etc., R. Co. v. Sheeks, 155 Ind. 74 32

U. S. v. Provident Trust Co., 291 U. S. 272, 284 21

Wass v. Suter, 84 N. E. 2nd (Ind.) 734 .....5, 32, 33
Wellisch v. John Hancock L. Ins. Co., 293 N. Y. 178, 184 5
Woodworkers Tool Works v. Byrne, 191 F. 2nd (C. A. 9) 667, 676, Par. (11) 5, 34

AUTHORITIES CITED

Am. Jur. (Vol. 38, § 298, p. 994) 25
Am. Jur. (§§ 297, 298, pp. 992, 994) 26

Federal Rules Civil Proc. 51 33
Funk & Wagnalls Standard Dictionary (1929) 25

Webster's New International Dictionary (2d ed.) .. 26
Wigmore on Evidence (2d ed., Vol. 5, §§ 2487 ff.) .. 26

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner herein prays that a writ of certiorari be issued to review the judgment (537) of the United States Court of Appeals for the Second Circuit, entered October 30, 1951, reversing a judgment in the sum of $35,000., plus costs, in favor of the plaintiff-petitioner, entered in the United States District Court for the Southern District of New York, on January 24, 1951, after a trial before Judge Gibson and a jury, in an action to recover for personal injuries sustained by plaintiff in an airplane crash (158).

Petition for rehearing was filed in the U. S. Court of Appeals for the Second Circuit, on November 8, 1951, and was denied by that court on December 19, 1951 (563).

Jurisdiction.

The jurisdiction of this court is invoked under U. S. Code Title 28, Section 1254 (1).

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* All references are to folios.

Opinion Below.

In the District Court, there was no opinion. In the U. S. Court of Appeals, there was an opinion by Judge Frank (530). Said opinion has not yet been reported. The Court of Appeals did not render any opinion on the denial of the petition for rehearing.

Questions Presented.

1. Assuming that the New York law of *res ipsa loquitur* was applicable, was not the charge of the District Judge, on that subject, *in its entirety,* and not merely as quoted in the opinion of the U. S. Court of Appeals, in strict accord with that law, and, accordingly, did not the U. S. Court of Appeals decide that question of law in conflict with applicable and controlling decisions of the New York Court of Appeals?

2. The accident having occurred in Indiana, and there being no New York authority determining whether New York would apply its own or Indiana's conception of the *res ipsa* principle, was not the Indiana law of *res ipsa loquitur* applicable?

3. Is not the principle of *res ipsa loquitur,* however characterized by the New York courts, for intra-state purposes, a substantive principle in the *Erie* v. *Tompkins* (304 U. S. 64) sense?

4. Assuming that the Indiana law was applicable, was not the charge given in accordance with the law of that State?

5. In any event, in the absence of an appropriate exception to the charge, raising the issue upon which alone the U. S. Court of Appeals predicated error, should the U. S. Court of Appeals have reversed the judgment of the District Court?

Reasons Relied Upon for Allowing the Writ.

This petition is predicated upon the following reasons, formulated in Paragraph 5(b) of Rule XXXVIII of the Rules of this court:

1.

The U. S. Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions".

The law of New York is clearly to the contrary of that declared by the U. S. Court of Appeals. So, also, is the Indiana law. The charge given—*including what was said as to the burden of proof* ([A. 1497] omitted from the excerpt quoted in the opinion)—was strictly in accord with the law of either State. The U. S. Court of Appeals misapprehended *Foltis* v. *City of New York* (287 N. Y. 108), and the Appellate Division decision of *Griffin* v. *N. Y. Central etc.* (see analysis, pp. 26-27, *infra*) upon which it relied, and overlooked that those cases decided no more than that, in a *res ipsa* case, there could not, directly or *indirectly*, be a directed verdict in favor of the plaintiff. The U. S. Court of Appeals' decision is contrary to the settled New York law, as conclusively established by a long line of decisions of the New York Court of Appeals, both preceding and subsequent to the *Foltis* case—not less than six since the decision of the *Foltis* case (discussed in our brief, *infra*, pp. 14-20). *Plumb* v. *Richmond, etc.* (233 N. Y. 285, *infra*, p. 24), under the circumstances here presented, unquestionably formulates the New York law, in conformity with the charge of the District Court, in this case. The Indiana decisions are equally unequivocal (discussed, *infra*, p. 32).

2.

The decision of the U. S. Court of Appeals is "in conflict with the decision of another circuit court of appeals on the same matter."

A.

We refer to *Lachman* v. *Pennsylvania Greyhound Lines* (160 F. 2nd [C. A. 4] 496), holding that the *res ipsa loquitur* principle is substantive, in the *Erie* v. *Tompkins* sense. To the same effect, *Smith* v. *Pennsylvania Central Airlines Corp.* (76 F. Supp. [D. C., Dist. of Col.] 940). In the case at bar, the U. S. Court of Appeals held that,

because an intermediate New York appellate court characterized the *res ipsa* principle as "procedural", it must be so deemed in the *Erie* v. *Tompkins* sense. In the Fourth Circuit *Lachman* case, however, the court said:

> "The rule of res ipsa loquitur is not a rule relating to the burden of proof and its application does not result in shifting the burden of proof. * * * It does, however, relate to the 'general obligation, imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action'; and if 'proof of plaintiff's freedom from fault is a part of the very substance of his case,' on the same principle, it must be held a matter of substance that proof of the occurrence of injury will or will not justify a finding of liability on the ground of negligence" (pp. 499-500).

Such is also the New York Court of Appeals' conception of the substantive character of the defense of contributory negligence:

> "While it is true that in this state we speak of the proof of freedom from contributory negligence as being a burden of proof resting on the plaintiff, it is, in reality, *even here,* more than a mere burden of proof, it is a *substantive* part of the plaintiff's right to recover" (*Fitzpatrick* v. *International Ry. Co.,* 252 N. Y. 127, 133).

The foregoing quotations emphasize and point the basic error of the U. S. Court of Appeals in the case at bar, *i. e.,* that it failed to observe the distinction between a mere question of burden of proof, and the substantive nature of the *res ipsa* principle, *which does not involve any shift in the burden of proof at all.* So, the U. S. Court of Appeals reveals its basic misapprehension in the statement (referring to the New York courts):

> "If they follow local law in so vital a matter as burden of proof, it seems *a fortiori* true that they would not bow to foreign law where a mere rule of evidence was concerned."

This is a complete non-sequitur. The *"a fortiori"* is the other way. Though New York is not in accord with the weight of authority, as to the incidence of the burden

of proof of contributory negligence, it nevertheless recognizes the substantive character of the contributory negligence principle, in the conflict-of-laws, *i. e.*, the *Erie* v. *Tompkins* sense! For it, what is procedural intrastate is nevertheless substantive in the conflict-of-laws sense! For this court, that may be so, too! (see No. 4, *infra*). *A fortiori,* since the *res ipsa* principle does not shift the burden of proof, and since New York is in accord with the well-nigh universal proposition that the *res ipsa* principle creates a provable cause of action, where, otherwise, there would be none.

> "The rule, strictly speaking, *merely takes the place of evidence* as affecting the burden of proceeding with the case, and is not itself evidence" (*Plumb* v. *Richmond Light & R.R. Co.,* 233 N. Y. 285, 290).*

Such is also the law of Indiana, for, in *Wass* v. *Suter* (84 N.E. 2nd [Ind.] 734), it was the *Plumb* case (*supra*) upon which the Indiana court relied and upon which it founded its decision.

B.

There is also conflict between the U. S. Courts of Appeals for the Ninth Circuit and the Second Circuit (as reflected in this record), by reason of the fact that the Ninth Circuit, under circumstances precisely the same, holds that, in the absence of an appropriate exception, the issue here presented is not open for review (*Woodworkers Tool Works* v. *Byrne,* 191 F. 2nd [C. A. 9] 667, 676, par. [11]).

3.

> The U. S. Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this court".

No decision of this court passes upon the nature of the *res ipsa* principle, in the *Erie* v. *Tompkins* sense. In this

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* Cf.—recognizing this analysis of the nature of the presumption: *Wellisch* v. *John Hancock L. Ins. Co.* (293 N. Y. 178, 184); *Peo. ex rel. Wellington Apts.* v. *Miller* (288 N. Y. 31, 33); *Matter of Magna* v. *Hegeman Harris Co.* (258 N. Y. 82, 84)—both before and after the *Foltis* case.

ever-expanding body of law, the public interest requires an authoritative definition, in this respect, of the limits of the *Erie* v. *Tompkins* principle of federal competence.

4.

The U. S. Court of Appeals "has decided a federal question"—*i.e.*, the true conflict-of-laws nature of the *res ipsa* principle—"in a way probably in conflict with applicable decisions of this court".

We refer to the dictum in *Cohen* v. *Beneficial Industrial Loan Corp.* (337 U. S. 541), to the effect that what may be "procedural" intrastate, may nevertheless be substantive in the *Erie* v. *Tompkins* sense. In the *Cohen* case, this court said:

"Even if we were to agree that the New Jersey statute is procedural, it would not determine that it is not applicable. Rules which lawyers call procedural do not always exhaust their effect by regulating procedure" (p. 555).

5.

The U. S. Court of Appeals has "sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision".

It will be observed that the sole criticism made by the U. S. Court of Appeals was of the charge (quoted in the opinion) as given. But that was not the whole charge! And the excerpt from *Griffin* v. *New York Central R. R. Co.* (277 App. Div. 320)—neither stated, in the *Griffin* case, nor approved under the circumstances of this case*—approves a charge which, if it had been given, would have clearly been error—since defendant, having gone forward with proof, and having done so with lack of candor, would thus, instead of having every inference taken most strongly against it, be rewarded for that lack of candor. Thus, would the *res ipsa* principle be nullified altogether. Defendant's request for an instruction to that effect, which was refused by the trial court (A.1485-6, quoted *infra* p. 11)—which *refusal* was not deemed by the U. S. Court of Appeals to be error—was thus made the law for a new

* See analysis, *infra*, pp. 26-27.

trial, notwithstanding the settled law of New York and of Indiana to the contrary (see authorities in annexed brief). A new trial under such infirmity may, and in all likelihood will, require another appeal or appeals, and still a third trial. Instead, the judgment under review should be reinstated.

The issues presented are of fundamental importance, with respect to the application of the principle of *res ipsa loquitur* in diversity cases pending in the federal courts. It is submitted that the U. S. Court of Appeals failed to follow the clear New York law on the subject, with the result that the basic principles of *Erie* v. *Tompkins* (304 U. S. 64) have not been observed, and that the consequence is and will be that litigants in the federal court for the Second Circuit will be governed, on this subject, by federally formulated rules of substantive law inapplicable either in New York state courts, New York being the state where the case was tried, or in the Indiana state courts, Indiana being the state where the accident happened. There can be no question that, unless both the New York and Indiana courts abdicate their function and prerogatives, the rule announced in the case at bar, insofar as it holds the trial court's instruction to be error, is a mere matter of words, and insofar as it eliminates the "call" for explanation, will not be followed.

The demonstration of these propositions requires an exposition of the New York and Indiana authorities. This we have done in the annexed brief, from which it will appear that local law has been misapprehended, and that New York concepts of conflict of laws have been formulated without New York authority or support therefor, and contrary to the considered dictum of the New York Court of Appeals, that even the rules as to contributory negligence are not procedural, but substantive.

The significance and effect of the decision and opinion of the U. S. Court of Appeals, in this case, is far greater than merely to decide a controversy between private litigants. It misapprehends the New York law of *res ipsa loquitur,* and therefore, furnishes an incorrect standard

in all *res ipsa* cases tried in the Second Circuit, whether the accident occurred in New York or elsewhere. It is not to be expected that the New York Court of Appeals will yield to the disregard of its own authorities. Accordingly, instead of being merely another state court, applying New York law, the federal court for the Second Circuit will be applying a law of its own.

The U. S. Court of Appeals' decision also presumes to declare, for New York, what shall be its policy of conflict of laws. This, in contravention of the true nature of the *res ipsa* principle.

This is *Erie* v. *Tompkins* in reverse.

The influx of litigations of this character, into the federal court—through removal—to obtain the benefits of such apocryphal rules, will be substantial. Thus is the very underlying policy of *Erie* v. *Tompkins* undermined. Before the clock is thus set back, this court should have the opportunity to pass upon the fundamental questions of policy involved.

The principle of *Erie* v. *Tompkins* was formulated in recognition of the fact that "In attempting to promote uniformity of law throughout the United States, the doctrine [*Swift* v. *Tyson* (16 Pet. 1)] had prevented uniformity in the administration of the law of the State" (p. 75), and in obedience to the principle that "the law to be applied in any case is the law of the State" (p. 78). The decision of the U. S. Court of Appeals, sought to be reviewed, though purporting to conform to such basic fundamental policy, as established by this court, actually honors it in the breach.

Conclusion and Prayer.

For the reasons stated, it is respectfully submitted that this petition to review the judgment of the United States Court of Appeals for the Second Circuit, should be granted.

JAY LEO ROTHSCHILD,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

Statement

The petition prefixed recites the required information as to the Opinion Below and Jurisdiction.

The case was tried before Judge Ernest W. Gibson and a jury, and occupied two weeks of the District Court's time.

Plaintiff, a physician and citizen of New York, sued to recover for injuries sustained while en route from New York City, via Buffalo to Chicago, as a passenger in a plane operated by defendant (a Delaware corporation), which plane, due to defendant's negligence, crashed on December 28, 1946 at Michigan City, Indiana. The case was tried on the *res ipsa loquitur* theory.

The negligence charged was defendant's failure properly to inspect and maintain the plane at Buffalo, New York—after the plane had been through a severe turbulence experience, on an attempted departure just preceding the accident (A. 1463)—with resulting engine failure. As bearing upon the propriety of the Court's instructions to the jury, here involved, it is important to note that defendant chose to go forward with its defense, but studiously avoided what was material. So it produced evidence as to the plane's airworthiness two years before the accident (in 1944), but not as to *continued* airworthiness, in 1946 when the accident occurred; as to routine inspections of the plane's structure (as distinguished from its mechanism and power plant) made before the "severe turbulence" trip, but not as to mechanical inspections and repair maintenance at Buffalo, New York, which indisputably were *not* made either before or *after* the "turbulence" trip, which immediately preceded the accident. So also it produced witnesses who knew nothing personally, but omitted

* References "A" are to folios of the Appendix; "T", to the Transcript. Italics and bold, unless otherwise indicated, are ours.

to produce its general superintendent at Buffalo, who had participated in the maintenance investigation, its dispatcher, who authorized the trip, its manager in charge of the Buffalo station, its employee who refilled the gas tanks, or its mechanics, or flight agent, all of whom were available to it (A. 1343-1346).

The Decision of the Court of Appeals

On appeal, the Court of Appeals found that there had been no legal error, except as to the court's charge with respect to the *res ipsa* principle. It so held because in its view the New York law applied, and as it appraised that law, it deemed the instructions erroneous. It held the Indiana law inapplicable, because it considered the *res ipsa* principle under New York law to relate merely to procedure. It expressed the thought without deciding the question, that the charge was erroneous under Indiana law, too.

The Charge

The substance of the trial judge's *entire* charge (not quoted in the opinion—see particularly, *infra,* p. 14), was as follows:

> "In this case the burden of proof is on the plaintiff to prove that the defendant was negligent, and that such negligence was a proximate cause of the accident." (A. 1466.)
>
> * * *
>
> "A presumption is something that takes the place of evidence. In a case like this where the instrumentality which produced the accident is under the exclusive control of the defendant, there is a presumption of negligence, but it might, however, be overcome by the evidence of the defendant to show that in spite of the presumption of negligence, the accident occurred through no fault of the defendant or its employees." (A. 1471.)
>
> * * *
>
> "If you find by the burden of proof that I have outlined that the defendant was negligent, then your ver-

dict will be for the plaintiff, if you feel such negligence to be the proximate cause of the accident.

"If you find that the defendant was not negligent, then that will end the case, and you will bring in a verdict for the defendant.

"If you find that the defendant, through its employees, to have been negligent either in maintenance or operation of the plane, then you must consider whether this negligence was the proximate cause of the accident." (A. 1473.)

To this charge, defendant's counsel took exception—it will be noted—not to the well-settled principles of *res ipsa loquitur* stated by the court, but to any charge of *res ipsa* at all:

> "I except to all of that, because I think what your Honor did was to practically give them a charge of res ipsa loquitur. In view of what the plaintiff's attorney said in his summation, where he repeatedly said the duty was on the defendant to explain the *cause* of the accident, I think your Honor's goes right along on that, and I except." (A. 1484.)

It should be noted that plaintiff's counsel made no such statement; furthermore, that there was no exception to the word "presumption", or to the content of the *res ipsa* charge, except as to *plaintiff's counsel's* observations as to the duty of explanation, *on which subject the court had not made any charge at all.*

Defendant's counsel then proceeded with these requests:

* * *

> "(1) That the doctrine of res ipsa loquitur means no more than that a plaintiff who brings himself within it makes out a prima facie case which entitles him to go to the jury, but he must still persuade the jury that the defendant was negligent, even though the defendant has presented no explanation of the accident.
>
> "I also ask your Honor to charge the jury that there is no obligation upon them, upon the defendant, in this case to explain the cause of this accident or to explain any of the circumstances of the accident.
>
> "The Court: The request is overruled, and an exception noted." (A. 1485-1486.)

It will be observed that the court had, in its instructions, charged all that was thus requested, except that the court had *not* charged that defendant was under any duty to explain the cause of the accident, or even to "explain" its circumstances. Defendant had undertaken to do so, with the result that the entire request was without relevance to the instructions actually given.

There was no justification for defendant's criticism of the trial judge for acquiescing in plaintiff's theory that there was a duty of explanation on the defendant in this case. The court had neither charged to that effect, nor had it acquiesced in *plaintiff's counsel's argument* that defendant had not been forthright in its purported explanation. Defendant's counsel, in his summation, had in so many words, undertaken "to explain to you as best we can what we know about the accident, whether or not there was any way to do anything to avoid the accident, whether we had done everything that we could do to avoid the accident * * *" (T 1376; see, also, 1376-78). Plaintiff's counsel had responsively argued to the jury that, "They must come forward *with everything within their knowledge* in order to assist you in reaching a conclusion" (A. 1343), and that having proceeded to explain the circumstances of the accident (of course, in the sense of elucidating all the facts *as it knew them to be*) it was the duty of defendant so to explain, *i.e.*, elucidate, the surrounding circumstances as to what was *material*. Plaintiff's counsel made it clear that he was merely arguing his view of the facts, and that the law was to come from the court (A. 1342-3). Under these circumstances, for the court to have charged the jury—in compliance with defendant's request—that defendant was under no duty "to explain any of the circumstances of this accident" (A. 1486), would have been to approve defendant's studied policy of withholding, rather than of supplying, the evidence within its control and, in effect, to direct a verdict for the defendant. The court observed that plaintiff's counsel did "argue it", and that the jury "can consider all the argu-

ments and what evidence you have had here, and I think you can get at the answer of what is right" (A. 1501). Plaintiff's summation "was matter of argument to the jury" (*Century Indemnity* v. *Arnold* [C. A. 2], 153 F. 2nd 531, 534), which should not be confused with instructions of law by the court. At no time did even plaintiff's counsel argue that defendant was obligated to explain the "*cause*" of the accident—only the surrounding circumstances! The distinction thus indicated is settled in New York law (*Plumb* v. *Richmond, etc.*, 233 N. Y. 285, 290).

It will be observed that the U. S. Court of Appeals found only that the trial judge's main charge was erroneous—not that the defendant's request should have been granted.

When the jury returned for instructions, the following occurred:

> "The Foreman: On the subject of negligence, will you tell us what really constitutes negligence in this case, not the facts of negligence but the meaning of negligence *and burden of proof of negligence,* and how much negligence, and so forth." (A. 1491.)

After the court had restated what constituted negligence, defendant's counsel asked the court "to charge the jury that in an action of this kind negligence is *never presumed* but must be proven by the preponderance of the credible evidence."

> "The Court: The burden of proof is on the plaintiff in this case to *prove* negligence. * * * The mere fact that there was an accident affords a presumption of negligence, but that presumption can be rebutted by the defendant by evidence tending to show that it did all it possibly could to avoid it. That is a matter to consider." (A. 1495.)

Defendant's counsel then asked that the court "charge that if the jury are unable to satisfy themselves as to whether or not the accident was caused by negligence on the part of the defendant, then their verdict should be for the defendant." (A. 1496.)

"The Court: *The burden is on the plaintiff to prove by a preponderance of the evidence that there was negligence.* **If they cannot sustain the burden, they have not satisfied the requirement.**" (A. 1497.)

The court had previously instructed the jury: "If the scales just balance or tip in the other party's favor, then the party who has this burden has failed to prove his case." (A. 1466.)

The jury, when it reported its verdict, conclusively confirmed that it knew what the issue was, and had adhered to it:

"The Foreman: We find the defendant in this case, American Airlines, *guilty of negligence,* and we have reached a round figure, after considerable discussion of damages, of $35,000." (A. 1507.)

Argument

For a summary of our contentions, we refer to the preceding Petition.

POINT I

Assuming that the law applicable was that of New York, the charge of the Court was in strict accord with it, as shown by an unbroken line of decisions of the New York Court of Appeals, both before and after the *Foltis* decision, upon which the U. S. Court of Appeals relied, but in misapprehension of its purport and effect.

The decisions of the New York Court of Appeals, *subsequent* to *Foltis* v. *City of New York* (287 N. Y. 108), furnish conclusive evidence of what is the New York law.

In the cases of *Schroeder* v. *City & County Savings Bank of Albany* (293 N. Y. 370) and *Dittiger* v. *Isal Realty Corp.* (290 N. Y. 492)—both decided after the *Foltis* case, and with Judge Lehman (who wrote the opinion in the *Foltis*

case) sitting and concurring*—instructions, in substance the same as those given by the trial judge in this case, were explicitly approved by the New York Court of Appeals, in overruling exceptions precisely directed to the points here again in issue. In the *Schroeder* case, the formulation of a "presumption" was approved. In the *Dittiger* case, the instruction was approved that the defendant, in the absence of explanation, might be found negligent. In *Nickisch* v. *Madison 34th Street Corp.* (295 N. Y. 833), on a trial before a court without a jury, it was held that the defendant should have come forward with an explanation of the accident so as to overcome the implications resulting from the plaintiff's proof. *Neuhoff* v. *Retlaw Realty Corp.* (289 N. Y. 293), is to the same effect.

In the *Schroeder* case, the Court of Appeals, in its opinion, said:

> "The trial court *correctly* charged the jury after the defendants had rested at the close of plaintiff's case without putting in any evidence, that the doctrine of *res ipsa loquitur was applicable*" (p. 373).

What occurred on the trial in the *Schroeder* case—on the issues thus "correctly charged"—was as follows:‡

(A) On the presumption issue:

The Court: "* * * the accident is prima facie evidence of negligence, or in oher words a *presumption* of negligence arises.

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* Six of the seven judges constituting the court which decided the *Foltis* case, were still members of the court which decided the *Dittiger* and *Schroeder* cases, and participated in the said decisions. Four of said judges were still members of the court when the *Nickisch* case was decided, and participated in that decision. In the *Neuhoff* case, the same judges constituted the court as in the *Foltis* case. Rather convincing evidence that the *Foltis* case did not decide what the U. S. Court of Appeals deemed to be its purport!

‡ We take this and the following excerpts from the records in Cases and Points on file in the Bar Association of the City of New York.

"* * * The fact of the occurrence and attendant circumstances merely furnishes some evidence which *requires* that defendant go forward with his proof and *rebut* negligence arising therefrom. This presumption may be *overcome* by evidence * * * and this presumption may also be *overcome* * * *"

"Mr. Simon: I ask your Honor to charge the jury that there is no presumption of negligence in this case * * *

"The Court: I decline to so charge.

"Mr. Simon: I respectfully except."

(B) On the issue as to whether defendant was under any duty of explanation, as to which it was also held that the trial court "correctly charged":

"Mr. Simon: I ask your Honor to charge the jury that under the evidence in this case that the defendant Bank or any of the defendants were under no obligation to go forward with any proof.

"The Court: Well, in the sense of compulsion, I charge that, that nothing would compel the defendants by physical force—

"Mr. Simon (interrupting): To which I respectfully except."

The New York Court of Appeals' reference at page 373 of the *Schroeder* opinion to *Galbraith* v. *Busch* (267 N. Y. 230), permits of no doubt of its view, that it was the defendant's duty to proceed with an explanation, in the light of which the "presumption" could be weighed and "overcome". For at page 234 of the *Galbraith* opinion, the New York Court of Appeals said that the *res ipsa* principle

"is sufficient to justify an inference of negligence and *to shift the burden of explanation to the defendant.*"

The following five cases are also dispositive of this question.

In *Dittiger* v. *Isal Realty Corp.* (290 N. Y. 492), the New York Court of Appeals said that the *res ipsa* rule

"* * * means only that defendant was put to the *necessity* of coming forward with an explanation of the

accident so as to *overcome* the implications resulting from plaintiff's proof' (p. 496).

The material portion of the record on this point was as follows:

[From the court's charge]

"I do mean to convey to you that from the happening of the accident in the manner described you may decide that there was negligence in the absence, *if you determine that there is an absence of a satisfactory explanation from the defendant.*" * * *

"Mr. Mellor: I except to your Honor's charge, which was substantially to the effect that from the happening of the accident the jury may find negligence on the part of the defendant, in the absence of an explanation from the defendant as to the cause of the falling of the ceiling.

"The Court: *I have so charged in the light of the very recent case, Foltis against the City of New York, Mr. Mellor.*"

The New York Court of Appeals, in the *Dittiger* case, approved this interpretation of the *Foltis* case—a decision irreconcilable with the interpretation given, by the U. S. Court of Appeals, to the Appellate Division decision in *Griffin* v. *N. Y. Central,* and, in reliance thereon, to the *Foltis* case, too.

In *Nickisch* v. *Madison 34th Street Corp.* (295 N. Y. 833), the New York Court of Appeals affirmed the judgment of the trial court that

"* * * plaintiff had made out a prima facie case and that defendant should have come forward with an explanation of the accident so as to *overcome* the implications resulting from plaintiff's proofs" (p. 834).

The detailed facts appear in the trial court's opinion (185 Misc. 25). The trial court found it decisive that "defendant failed to offer any evidence, although presumably it was in a position to explain what, if anything, had occurred * * * when it, through its employees, was in control * * *" (p. 27). The court relied on the same authorities hereto-

fore cited by us. It held that defendant "should have come forward to tell what it knew" (p. 28); "The fact that defendant did not choose to call this employee, and did not show any reason for not doing so, *requires* me to take the evidence in the case most strongly against it * * *" (p. 27).

In the case at bar, there was precisely the same situation. Defendant failed to call a single witness, of many to it available, who had knowledge of the material facts. It was therefore that plaintiff asked for the appropriate charge (A. 1500; *Milio* v. *Railway Motor Trucking Co.*, 257 App. Div. 640, 642). The request was erroneously refused. *Now the U. S. Court of Appeals has held (if we interpret its references to the Appellate Division Griffin case dictum correctly), that, in addition, defendant was entitled to a charge, in the phraseology of the Griffin case, giving it the advantage of the suppression of such evidence.* Thus, *sui generis,* in a *res ipsa* case, a defendant may withhold evidence and be rewarded for it—a negation of the entire *res ipsa* doctrine. Should the case be retried, the question will arise again, should the U. S. Court of Appeals' opinion remain undisturbed, and should the trial judge, on a new trial, deem the opinion of the appellate court to require an instruction to the jury in the *Griffin* phraseology.

In *Neuhoff* v. *Retlaw Realty Corp.* (289 N. Y. 293), the New York Court of Appeals, in a case tried without a jury, affirmed a judgment of the trial court because "plaintiff made out a *prima facie* case of negligence and that the *defendant should thereupon have come forward with its explanation*" (p. 295).

Surely, a jury may be instructed to appraise the evidence, as would a judge sitting without a jury.

In *Beinhocker* v. *Barnes Development Corp.* (296 N. Y. 925), the *res ipsa* charge made by the trial judge—to which specific exception was taken, but which was nevertheless approved by the Court of Appeals—was indistinguishable from the charge made in the case at bar. The trial judge instructed the jury:

"* * * it affords reasonable evidence in the absence of a satisfactory explanation by the defendants that the accident arose from want of care or negligence of the defendants. These circumstances raise the presumption that the accident occurred through the negligence on the part of the defendants, and the burden is thereby cast upon the defendants to explain the absence of such negligence on their part or that such negligence did not proximately cause the accident.

* * * *

"It is for you to say whether the explanation offered you by the defendants as to the manner in which they inspected and took care of that elevator, satisfies you that they were not negligent, sufficiently to rebut the presumption of the inference that you have a right to draw from the accident itself. If you say that the defendants failed in their duty, and that this accident would not have happened had they performed their duty properly, if you say from all the evidence you are convinced of that, you must find the defendants guilty of negligence" (pp. 176, 178 of record on appeal).

Specific exception was taken, as follows:

"Mr. Garvey: I respectfully except to so much of the court's charge as outlined the principle of res ipsa loquitur and permitting the jury to apply those principles to the facts in this case. I respectfully except to that portion of the charge wherein the court referred to the plaintiff's claim that the mere happening of this accident raises a presumption in reference to defendant's negligence which calls for an explanation from the defendants" (p. 186 of record on appeal).

Exception to the same effect was taken by other counsel immediately following the foregoing.

In *Hallett* v. *Stanley Stores, etc.* (301 N. Y. 698—affirming 276 App. Div. 386), the trial judge instructed the jury that:

"If you find that the sign did drop then that would be some evidence of negligence on the part of this defendant and would require an explanation, at least" (p. 96 of record on appeal).

In that case, there was no exception to the charge, but the Appellate Division for the First Department reversed the judgment of the trial court, setting aside the verdict—*and reinstated that verdict*—because the *res ipsa loquitur* principle applied—citing *McNulty* v. *Ludwig & Co.* (153 App. Div. 206, 212)—and the New York Court of Appeals affirmed.

The denial, in the *Foltis* opinion, of the existence of any "presumption", was as to a "full" or *conclusive* presumption, *i. e.,* of law, which would operate to justify a directed verdict, and thus to take the issue away from the jury (p. 120 of the *Foltis* opinion). It was in that connection, and only in that connection, that the court, in analyzing the *nature* of the presumption, said that it was more accurate to characterize the substantive law supplement, which had enabled the plaintiff to go to the jury, as a permissible "inference" and not as a "conclusive presumption". The use of the word "presumption" was unobjectionable, providing it was made clear to the jury that the plaintiff had the burden of establishing proximate negligence.

Such is undoubtedly the law of New York, unless we are to disregard all of the decisions of the New York Court of Appeals, both preceding and following the *Foltis* case. The subsequent authorities (above recited) confirm the meaning of what was said in the *Foltis* case. That, in the case at bar, the trial judge complied with this requirement, there can be no question.

All that was decided in the *Foltis* case as to "presumption" was what has been long settled in New York law, *i. e.*:

> "'Presumptive evidence and the presumptions or proofs to which it gives rise are not indebted for their probative force to any rules of positive law; but juries, in inferring one fact from others which have been established, do nothing more than apply, under the sanction of the law, a process of reasoning, the force of which rests on experience and observation, and such inferences are presumptions of fact'" (*Peo. ex rel. Woronoff* v. *Mallon,* 222 N. Y. 456, 464-465, citing and quoting from *Justice* v. *Lang,* 52 N. Y. 323, 329).

"A presumption is an inference of a fact not known arising from its necessary or usual connection with others which are known" (*Hilton* v. *Bender*, 69 N. Y. 75, 82).

Presumptions are

"subject to be rebutted, though they have been varying statements of the cogency of the evidence sufficient to repel it" (*Matter of Findlay*, 253 N. Y. 1, 7).

"Presumptions of fact * * * should be made upon the common principles of induction" (*O'Gara* v. *Eisenlohr*, 38 N. Y. 296, 303).

"* * * **Presumptions are indulged in to supply the place of facts**" (*Matter of Matthews*, 143 App. Div. 561, 562, citing and quoting, *in haec verba*, *Lincoln* v. *French*,* 105 U. S. 614, 617).

* * *

"They are never allowed against ascertained and established facts. When these appear, presumptions disappear" (*Matthews* case, *supra*, p. 562).

In *Plumb* v. *Richmond etc.* (233 N. Y. 285)—a *res ipsa* case, the court said:

"The rule, strictly speaking, merely takes the place of evidence as affecting the burden of proceeding with the case, and is not itself evidence" (p. 290).

As to the "duty to explain", the Court of Appeals, in the *Foltis* case, said:

"If the city has in its control evidence which would make clear the cause of the break or would show exactly what care it has exercised in the construction and maintenance of the water main, a failure to produce such evidence might be a factor in weighing probabilities" (p. 117).

Furthermore, in the *Foltis* case, the court quoted from *Salomone* v. *Yellow Taxi Corp.* (242 N. Y. 251, 259),

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* Cited and quoted in *U. S.* v. *Provident Trust Co.* (291 U. S. 272, 284).

as follows:

> *"Even when there be a presumption of negligence arising from a failure upon the part of a common carrier to explain how an accident happened,** it is for the jury to say whether the presumption, which is only prima facie evidence of negligence, entitles the plaintiff to a verdict. * * * That is, a failure to explain does not *necessarily* indicate negligence" (p. 122).

The court in the *Foltis* case then said:

> "For these reasons we conclude that the trial court erred in granting the plaintiff's motion for the *direction* of a verdict" (p. 123).

The U. S. Court of Appeals, it is submitted, overlooked the fact that all that was said in the *Foltis* case was directed to that point alone, *i. e.,* that there was no basis for the *direction* of a verdict. The trial court could not direct a verdict, but the jury had the right to weigh the evidence in the light of the performance by defendant of its duty to come forward with available evidence in its control.

Indeed, in the *Foltis* case, the court puts the issue—not involved in the charge as made by the trial judge, in the case at bar, but sought to be injected by defendant's request to charge—at rest:

> "The trial judge also stressed the fact that no evidence whatsoever as to the cause of the break in its pipe was offered by the city, though there was every reason to suppose that it had accurate knowledge of that matter. I think this emphasis was as it ought to have been. *When one party to an action, knowing the truth of a matter in controversy and having the evidence in his possession, omits to speak, every inference warranted by the evidence should be indulged against him"* (p. 125).

What the *Foltis* case does, is to adopt the rule formulated by this court, in *Sweeney* v. *Erving,* 228 U. S. 233, 240, that the "facts of the occurrence * * * *call* for explanation or rebuttal, not *necessarily* that they require it" (p.

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* Italics the Court's.

119 of the *Foltis* opinion), *i. e.*, that, though defendant is under a duty of explanation, nevertheless, if it fails to make an explanation, **a verdict may not be directed against it.** What the prior and subsequent cases do, is, in effect, to stipulate that every inference may be taken most strongly against the defendant, if he does not go forward with evidence under his control, and that, if he does, the conclusion as to whether he was negligent, may be reached in the light of that explanation, thus undertaken.

The *Foltis* case decides no more than what was said in *Prosser* on Torts [1941] before the *Foltis* case was decided: "* * * no burden of introducing evidence is cast upon the defendant, in the sense of a directed verdict against him if he fails to do so—if he introduces no evidence at all, the jury may still find in his favor" (p. 303)—citing *Sweeney* v. *Erving* (228 U. S. 233), which is the basic authority cited by the New York Court of Appeals in the *Foltis* case, too! (p. 119)

That the word "presumption" was in itself unobjectionable—provided that the making of the inference of fact was left to the jury, with the burden of proof on the plaintiff, is shown, not only by the *Foltis* case and by the many New York Court of Appeals decisions following it, but by a long line of prior decisions, all frequently relied upon as *leading New York authorities,* many of them, even in the *Foltis* case.

So, as far back as *Mullen* v. *St. John* (57 N. Y. 567), it was held that a *res ipsa* case "affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care" (p. 571); "* * * the presumption of negligence may arise" (p. 572). In *Cunningham* v. *Dady* (191 N. Y. 152), it was held that the "presumption only establishes a *prima facie* case," and "defendant is then charged with the obligation of meeting such a case" (p. 157). In *Griffen* v. *Manice* (166 N. Y. 188), it was held that a charge, in a *res ipsa* case, that "you have a right to presume that such care was wanting" (p. 192), was correct. In *Galbraith* v. *Busch* (267 N. Y. 230), the principle was formulated as a "duty

upon the defendant of going forward and producing evidence to *rebut* an inference or presumption of negligence" (p. 233). In *Lessig* v. *N. Y. C. R.R. Co.* (271 N. Y. 250), quoting from *Slater* v. *Barnes* (241 N. Y. 284, 287), it was said, as to the defendant, that "a presumption arises against him" (p. 253). In *Salomone* v. *Yellow Taxi Corp.* (242 N. Y. 251), the characterization was of a "presumption of negligence", which may be "*overcome*" (p. 259). In *Neuhoff* v. *Retlaw Realty Corp.* (289 N. Y. 293), it was held that defendant should have come forward with its explanation. In *Bressler* v. *N. Y. R. T. Corp.* (270 N. Y. 409), it was said that "In the absence of evidence by plaintiff tending in some degree to explain the cause of this accident * * * defendant * * * would be in the best position to go forward with proof tending to *rebut* an inference of negligence and to show that the occurrence was without its fault" (p. 413). And we have heretofore seen the line of cases, subsequent to the *Foltis* case, precisely to the same effect.

The last word from the New York Court of Appeals is its opinion in *Manley* v. *New York Telephone Co.* (303 N. Y. 18), in which the court referred to the "presumption of negligence", and made the observation that "circumstances of the case unexplained justify the inference of negligence, otherwise there is no inference which a defendant is *called on* to *rebut* or explain" (citing *Galbraith* v. *Busch, supra*). The court also cites the *Foltis* case, with no thought that the *Foltis* case overrules all of the other decisions.

There can be no doubt, upon a careful analysis of the *Foltis* case, that it did not *change* the law as theretofore consistently administered in New York, but that it merely limited its extension—in violation of fundamental principles—to authorize a directed verdict for defendant. *Plumb* v. *Richmond Light & R. R. Co.* (233 N. Y. 285), is twice cited in the *Foltis* opinion. It is a leading case in New York, and precisely in accord with the charge made by the court in the case at bar. The charge approved in the

Plumb case was as follows:

> "When such a collision takes place, there arises, *as a rule of evidence, a presumption of negligence* [italics the Court's] upon the part of the carrier, which calls upon it for an explanation. I do not mean, in making this statement, that this rule of evidence shifts the burden of proof from the shoulders of the plaintiff on to the shoulders of the defendant, but only that the company from the fact of the collision, * * * is called upon to make an explanation; and then it is for you to determine on the whole case, on all the evidence, whether there is a preponderance of the evidence in favor of the plaintiff's contention that there was negligence upon the part of the defendant" (pp. 287-8).

Exception was taken, as in the case at bar.

The court said that the *res ipsa* principle permitted "an inference of culpability on the part of the defendant", made out a "*prima facie* case", and presented "a question of fact for the defendant to meet with an explanation." "Shifting the burden of explanation or of going on with the case does not shift the burden of proof. If a satisfactory explanation is offered by the defendant, the plaintiff must rebut it by evidence of negligence or lose his case. On the whole case there must be a preponderance of evidence in favor of plaintiff's contention" (p. 288). The doctrine is repeatedly characterized as one creating a "presumption" (p. 289). "*The rule, strictly speaking, merely takes the place of evidence as affecting the burden of proceeding with the case, and is not itself evidence*" (p. 290).

It is of no importance whether the permissible conclusion to be drawn is labelled "inference" or "presumption." "*Res ipsa loquitur* creates an inference *or* presumption of negligence" which is to be weighed and considered as against the evidence adduced by the defendant in rebuttal thereof" (*38 Am. Jur. § 298, p. 994*). The words "inference" and "presumption" are interchangeable, not only under the aforesaid authorities, but in common usage as well (*cf. Funk & Wagnall's Standard Dictionary* [1929];

Webster's New International Dictionary [2d ed.]; *Wigmore on Evidence* [2d ed., Vol. 5, §§ 2487 ff.]). The difference between "inference" and "presumption" is purely semantic, and with no practical consequence (see *Am. Jur.* §§ 297, 298, pp. 992, 994). The point is well made in the opinion of a distinguished federal judge, who was well versed in New York law (Hough, Cir. Judge, in *Erie R. Co.* v. *Murphy* ([C. A. 2] 9 F. 2nd 525, 526, 527), to the effect that the use of the one word or the other is of no consequence, as long as a jury of "intelligent men" are advised that inference or presumption "does not relieve from the burden of proof but does put the burden of evidence—*i. e.*, of explanation—on * * * the defendant * * *" (id. p. 526, citing *Kraljer* v. *Snare* [C. A. 2], 221 F. 255). The *Kraljer* case was predicated, as was the *Foltis* case, on this court's opinion in *Sweeney* v. *Erving* (228 U. S. 233). The rule of that case, however viewed, does not depend on the use of the word "inference" rather than "presumption". So the *Foltis* case recognized (123-124). The later cases clearly and uniformly approve the word "presumption". What is indispensable is an instruction that it is for the jury to say whether there was negligence, and that the defendant may "overcome" or "rebut" the inference or presumption, and that the burden of proving negligence is on plaintiff. This, the trial judge did, clearly, unmistakably, and repeatedly, in the case at bar, in accordance with settled New York law.

In the light of these authorities, it is plain that the Appellate Division decisions, upon which the U. S. Court of Appeals relied, have no application.

In *Griffin* v. *New York Central R. R. Co.* (277 App. Div. 320) from which the U. S. Court of Appeals quoted what was apparently intended to be the formulation of a correct charge, the instructions of the trial court were as follows:

As to the first cause of action that there arose:

"'* * * a presumption of negligence on the part of the defendant, which calls upon it for an explanation. * * *

" 'When I said a presumption of negligence arises, I simply mean this, that calls upon the defendant to give an explanation as to how that collision occurred. It does not shift the burden of proof from the plaintiff to the defendant at all. The plaintiff must still establish his cause of action and show that there was negligence * * *' "

As to the second cause of action:*

" 'But in order to find the defendant negligent on that second cause of action, you would have to find that its explanation which it has given here by its engineer and fireman *has not satisfied* you that it was *not* negligent' " (p. 323).

There was no criticism of the instructions as to the first cause of action. No more is involved in this case.

Only as to the second cause of action, the Appellate Division said:

> *"While we might not be meticulous about the use of the word 'presumption' instead of the word 'inference',* we think that the charge may have given the improper impression that upon the happening of the accident alone there was a presumption of negligence which would **require** *the jury to find a verdict for the plaintiff* unless the defendant offered an explanation which satisfied the jury that defendant was *not* negligent" (p. 323).

The court was of the opinion that thus, *as to the second cause of action,* the burden of proof "may have" been shifted.

No such thought is possible as to the charge in the case at bar. The criticism had basis in the *Griffin* case, by reason of the failure of the trial judge, *in that case,* to charge that the presumption of negligence could be rebutted. Indeed, a reading of the defendant-appellant's brief, in that case, will show that that was the burden of its grievance. The last thing the trial judge said, in the case at bar, was: "If they cannot sustain the burden they have not satisfied the requirement" (A. 1491-1497). Yet, the opinion of the U. S. Court of Appeals conveys the

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* Separated, as the record on appeal shows, by two pages of perfectly sound instruction.

impression (as a trial judge may read it) that a jury should be instructed contrary to the charge *as to the first cause of action,* which the Appellate Division approved.

Judd v. *Sams* (270 App. Div. 981; aff'd 296 N. Y. 801), upon which the U. S. Court of Appeals also relied, is in the same category as the *Griffin* case. The detailed facts appear in the memorandum of affirmance in the New York Court of Appeals. The case was not *res ipsa* at all. The charge requested was erroneous, not because it called upon the defendant to explain, but because it required the defendant to prove that he was *not* negligent, *i. e.,* that the defendant "explain *away* the happening of this accident to *avoid* liability" (p. 802, of 296 N. Y.). The Appellate Division held no more than that the request was "properly denied *in the language requested*". The court said that the *res ipsa* rule did not "ordinarily" create "a presumption" in plaintiff's favor. The court was referring to a *conclusive* presumption, such as was considered by the New York Court of Appeals in the *Foltis* case, as a basis for a directed verdict (p. 120 of the *Foltis* opinion).

Schulz v. *Finn* (273 App. Div. 780)—cited in the *Griffin* case—is to the same effect. There, it was held error to charge that, upon proof of the event, it followed that "then defendant *is* negligent".

POINT II

The issue with respect to the New York policy as to whether it would apply the Indiana law of *res ipsa,* may be deemed open. But whatever indications there are, are to the effect that New York would apply Indiana law. The question being undecided, and defendant having taken no exception on the point, the U. S. Court of Appeals should have considered the proposition on principle, and, in any event, on such an issue—in the absence of distinct exception—should not have reversed the District Court.

Eliminating the assumption underlying our Point I—*i. e.,* that the New York law applies—and inquiring into the

validity of that assumption, it is submitted that the U. S. Court of Appeals misapprehended the effect of *Judd* v. *Sams* (270 App. Div. 981). That case was not a *res ipsa* case at all. Furthermore, even the Appellate Division dictum shows that the *res ipsa* principle is something more than "procedural", for it furnishes, as the court said, "some evidence", *i. e.,* as stated by the New York Court of Appeals in *Plumb* v. *Richmond, etc. (supra),* it is a presumption which "takes the place of evidence."

It is therefore that "*Res ipsa loquitur* * * * furnish(es) circumstantial evidence of negligence where direct evidence of it may be lacking", and that the circumstances "call for explanation or rebuttal" (*Foltis* case, p. 119, adopting the rule of *Sweeney* v. *Erving,* 228 U. S. 233, 240). Such a concept of the doctrine gives it status as a presumption of fact—and negatives any thought that, in the conflict-of-laws sense, it is merely a procedural rule of evidence. It creates a *prima facie* cause of action, where otherwise, there would be none. When a plane falls, the event, standing alone, proves nothing. Coupled with the *res ipsa* presumption, supplementing the basis for an inference either way, it affords the basis for a finding of negligence.

It is therefore that what may be termed "procedural", intrastate, where true identification of the nature of the *res ipsa* principle is unnecessary, becomes substantive, interstate, in the realm of conflict of laws, where true identification is indispensable. It is recognized, in the realm of conflict of laws—because there is, as to *res ipsa,* no mere shifting of the burden of proof, and because the principle gives a right to recover, where, otherwise, there would be none—that the doctrine is one of substantive law (*Lachman* v. *Pennsylvania Greyhound Lines* ([C. A. 4], 160 F. 2nd 496).

The decision of the U. S. Court of Appeals, in the case at bar, conflicts with the views thus expressed in the Fourth Circuit. It is also in conflict with the able opinion of District Judge Holtzoff, in *Smith* v. *Pennsylvania Central Airlines Corp.* (76 F. Supp. [D. C., Dist. of Col.]

940). We say there is conflict, though, in the *Lachman* case, what was under consideration was the law of Maryland, whereas, here, our concern is with New York law. This, because, in the absence of any expression of view by the Maryland courts, the *res ipsa* principle was considered substantive, in the *Erie* v. *Tompkins* sense, whereas, in the case at bar, in the similar absence of any authoritative decision by the New York courts, the U. S. Court of Appeals, notwithstanding a deliberate dictum of the New York Court of Appeals, as to the nature of the contributory negligence principle—unquestionably less substantive in the conflict-of-laws sense, than the *res ipsa* principle—held the *res ipsa* principle to be procedural But, to label the *res ipsa* principle "procedural", settles nothing, in the *Erie* v. *Tompkins* sense (*Cohen* v. *Beneficial Ind. Loan Corp.*, 331 U. S. 541, 555, excerpt at p. 6, *supra*).

With respect to contributory negligence, as between jurisdictions in which the burden of proving freedom from contributory negligence is said to be on the plaintiff, and those in which the burden of proof is said to be on the defendant, there is a shifting of the burden of proof. In either category, that the plaintiff shall not have been guilty of contributory negligence, is a substantive element which may not be eliminated, in an inquiry as to whether the plaintiff may recover. Such was the observation in *Fitzpatrick* v. *International Ry. Co.* (252 N. Y. 127; excerpt quoted, p. 4, *supra*). Accordingly, in the *Fitzpatrick* case, we have a recognition, by the New York Court of Appeals, of the appropriate *conflict-of-laws characterization,* even of contributory negligence, as a substantive proposition. Recognizing this fact, the New York Court of Appeals did not decide that even contributory negligence was merely "procedural", in the *intrastate sense.* It left the question open*—even for cases in the state court—and dealt with the issue before it as one of policy (p. 135).

* "This point, however, we need not pass upon at this time" (p. 135).

In any event, the *res ipsa* principle is substantive law, far more clearly than appears as to contributory negligence. In the *res ipsa* principle, there is no semblance of mere "evidence" or "procedure"—certainly not in the conflict-of-laws sense, because the burden of proof never shifts, and a presumption (not conclusive, but permissible, and, therefore, permitting of an inference) supplies the essential proof—as a jury may view it—otherwise lacking. Unless the *res ipsa* principle be deemed to supply evidence of negligence—on the face of the proof obviously lacking—it has no meaning at all. The *res ipsa* principle accomplishes more than permissible inference of culpable negligence from merely circumstantial evidence. It takes the place of evidence; supplements it, and supplies what is lacking, *i. e., evidence of negligence* subject to veto by a jury. Otherwise, it serves no purpose and, in the interests of realism, might just as well be abolished. To permit an inference from circumstantial evidence, *simpliciter,* the *res ipsa* rule is not necessary. It is only where there is *no* evidence, and where, therefore, there would otherwise be no provable or *prima facie* cause of action, that the *res ipsa* principle serves a purpose.

We can add nothing to the illuminating opinion of Dobie, J., in the Fourth Circuit, in *Lachman* v. *Pennsylvania Greyhound Lines, Inc.* (160 F. 2nd 496)—in which the proposition we urge is fully considered, and where there was also "some ambiguity in the Maryland cases" (p. 500)—and of Judge Holtzoff in *Smith* v. *Pennsylvania Airlines Corp.* (76 F. Supp. [D. C., Dist. of Col.] 940).

Regarding the *res ipsa* principle, as one of substantive law, in the *Erie* v. *Tompkins* sense, the charge of the trial judge, in the case at bar, was less burdensome on defendant than authorized by Indiana law, which, though placing the burden of proof on the plaintiff, like the law of New York, calls upon the defendant to explain the surrounding circumstances in order to rebut the presumption of negligence, of which plaintiff has the benefit—if indeed, it does not

require more. In *Indianapolis Street R. Co.* v. *Schmidt* (163 Ind. 360), the Supreme Court of that State said:

> "The fifth instruction given by the court is objected to on the ground that it informed the jury, in substance, that when an accident happens to a passenger, a presumption of negligence on the part of the carrier arises, and that in such case it is incumbent on the carrier to produce evidence which will **excuse** its *prima facie* failure of duty. The rule stated in the instruction has received the sanction of this court in numerous cases, and we perceive no reason for abrogating or modifying it" (p. 368).

Quoting from *Terre Haute, etc., R. Co.* v. *Sheeks* (155 Ind. 74), the court continued:

> "* * * in other words, it [defendant] has the burden of proving, in order to rebut the presumption of negligence, under the circumstances, that the accident could not have been avoided by the exercise of the **highest** practical care and diligence" (p. 95 of cited case).

Continuing, the Indiana court said, in the *Indianapolis* case:

> "Proof of the accident and injury to the appellee, while being carried as a passenger by the appellant, in its car, over its road, in connection with the formal matters stated in the complaint, raised a presumption of negligence on the part of the appellant, and it then devolved on the appellant to show by the evidence in the cause a **legal excuse** for the accident" (p. 369).

Defendant has no cause for complaint that the trial judge did not charge as strongly against it, as permitted by Indiana law.

On all points, the Indiana law disposes of every criticism which defendant makes of the court's instructions.

In *Wass* v. *Suter* (84 N. E. 2nd [Ind.] 734)—a decision of an intermediate Indiana court—which alone was cited by the U. S. Court of Appeals, nothing to the contrary was held. It decided only that the distinction between contributing possible causes, as part of the surrounding cir-

cumstances, and proof of the precise, exact and specific causes—*i. e.*, the proximate cause—should be observed, and recognized the right of a plaintiff, in a *res ipsa* case, to get down to particulars, on rebuttal. The *Wass* case is precisely the same as *Plumb* v. *Richmond Light & R.R. Co.* (233 N. Y. 285), and relied upon that case for authority. If the Indiana law is the same as that of New York, as the U. S. Court of Appeals suggests, that is so because the New York law is as stated in the *Plumb* case (*supra*) and not as misapprehended by the U. S. Court of Appeals. Neither the *Wass* case nor the *Plumb* case may be reconciled with the decision of the U. S. Court of Appeals.

It is significant that the words "presumption", "rebut" and "explain" are the words of art used throughout the Indiana cases. The charge in the case at bar employed the terminology of the Indiana authorities, and of the New York authorities too.

POINT III

There having been no appropriate exception by the defendant upon the point on which the U. S. Court of Appeals thought there was error, there should not have been any reversal of the judgment of the District Court.

Since the New York Court of Appeals has not spoken on the conflict of laws aspect of this subject, though, on contributory negligence, it has expressed its dictum—clearly enough in favor of our contention—it is submitted that the U. S. Court of Appeals should not have pioneered. "If reasonably avoidable we should certainly avoid becoming a court of first instance for the determination of varied rules of local law prevailing in the forty-eight states" (*Helvering* v. *Stuart*, 317 U. S. 154, 164). *A fortiori*, in the absence of an appropriate exception! (F. R. C. P. 51). Defendant preferred to set an ambush for the trial judge.

It did not claim the New York law, nor repudiate the application of Indiana law. Under circumstances such as here, this court has said that "a general exception is not sufficient. In fairness to the trial court and the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where a part of the charge was correct, he may not through a general exception obtain a new trial" (*Palmer* v. *Hoffman,* 318 U. S. 109, 119).

In a *res ipsa* case, under circumstances precisely the same as here, it was held that the point was unavailable to the defendant-appellant (*Woodworkers Tool Works* v. *Byrne,* 191 F. 2nd [C. A. 9] 667, 676, par. [11]).

CONCLUSION

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to review its judgment.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Attorney for Petitioner.

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CHARLES E. [illegible]
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IN THE

Supreme Court of the United States

October Term, 1951

No. 535

MERVYN J. LOBEL,
Petitioner,

against

AMERICAN AIRLINES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM J. JUNKERMAN,
Counsel for Respondent,
80 Broad Street,
New York 4, N. Y.

DOUGLAS B. BOWRING,
Of Counsel.

INDEX

	PAGE
Opinion Below	1
Statement	1
Argument	3
I—The judgment of the Court of Appeals sought to be reviewed is a non-final judgment, and the issue involved is not of such fundamental importance as to warrant review by this Court at this stage	4
II—The holding of the Court of Appeals sought to be reviewed is one involving issues of local state law only, is consistent with the holdings of the New York courts upon the same questions, and is therefore not appropriate for review by this Court	5
III—In any event the decision of the Court of Appeals in reversing the judgment upon the grounds stated was clearly correct	8
IV—No conflict of decisions, and no important question of federal law is involved	13
Conclusion	14

Cases Cited

PAGE

American Construction Company v. Jacksonville, Tampa and Key West Ry. Co., 148 U. S. 372 4

Beinhocker v. Barnes Development Corp., 296 N. Y. 925 12

Clark v. Harnischfeger Sales Corp., 238 App. Div. 493, 264 N. Y. S. 873 ..... 5, 10

Erie R. Co. v. Tompkins, 304 U. S. 64 5

Estate of Spiegel v. Commissioner, 335 U. S. 701 7

Fitzpatrick v. International Ry. Co., 252 N. Y. 127 8

Foltis v. City of New York, 287 N. Y. 108, 38 N. E. 2d 455, 153 A. L. R. 1122 ..... 5, 8

Griffin v. New York Central R. Co., 277 App. Div. 320, 98 N. Y. S. 2d 346 ..... 5, 10

Hallett v. Stanley Stores, etc., 301 N. Y. 698 12

Hillsborough v. Cromwell, 326 U. S. 620 7

Huddleston v. Dwyer, 322 U. S. 232 6

Judd v. Sams, 270 App. Div. 981, 62 N. Y. S. 2d 678 ..... 5, 8

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487 ..... 5, 13

Land v. Dollar, 330 U. S. 731 4

Larson v. Domestic and Foreign Corp., 337 U. S. 682 4

Neuhoff v. Retlaw Realty Corp., 289 N. Y. 293 12

Nickisch v. Madison 34th Street Corp., 295 N. Y. 833 12

Palmer v. Hoffman, 318 U. S. 109 ..... 6, 9

Ragan v. Merchants Transfer Co., 337 U. S. 530 6

Wright v. Palmison, 237 App. Div. 22, 260 N. Y. S. 812 5

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AMERICAN AIRLINES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit, reversing the judgment of the United States District Court for the Southern District of New York and remanding the cause for a new trial, has now been officially reported at 192 F. (2d) 217.

Statement.

This was an action brought by plaintiff, a physician, against American Airlines, Inc., a Delaware corporation, to recover for injuries allegedly suffered by him in the crash of one of defendant's airplanes on December 28, 1946, at Michigan City, Indiana.

Federal jurisdiction was based upon diversity of citizenship of the parties.

The case was tried before District Judge Ernest W. Gibson and a jury in the Southern District of New York beginning on January 8, 1951, and resulted in a verdict and judgment for plaintiff in the sum of $35,000.

Defendant appealed from this judgment to the United States Court of Appeals for the Second Circuit. The appeal was argued in that Court on October 5, 1951, and on October 30, 1951, the Court of Appeals unanimously reversed the judgment of the District Court and remanded the cause to that Court for a new trial. The ground for reversal was error in the charge of the trial judge upon the effect of the doctrine of *res ipsa loquitur*. The Court of Appeals held (1) that under the decisions of the New York courts, the *res ipsa* doctrine is procedural and therefore to be applied in accordance with the law of the forum, and (2) that the trial court's charge on the doctrine was "patently in error" under New York law.

The present petition attacks these holdings of the Court of Appeals as error.

On other points urged by defendant-appellant as grounds for reversal, the Court of Appeals held for plaintiff-appellee. These points included: (1) that the trial court erred in holding that doctrine of *res ipsa loquitur* was applicable to the facts of this case, (2) that the trial court erred in admitting into evidence the report of a Civil Aeronautics Board investigator despite the provisions of § 701(e) of the Civil Aeronautics Act (49 U. S. C. A. § 581), (3) that the trial court erred in denying defendant's motion for a mistrial upon the grounds that reference

had been made, improperly, to the fact of defendant's insured status, and (4) that the trial court erred in admitting into evidence, on behalf of plaintiff, his own answers to interrogatories. (The Court of Appeals specifically held that the admission of these answers into evidence was error, but stated that "the error was harmless".) If the present petition is granted, and if this Court should hold that the Court of Appeals erred in reversing the judgment below upon the single ground specified in the opinion, respondent will urge that the Court of Appeals erred in holding that the four rulings of the trial court noted above did not constitute reversible error.

Argument.

In opposing the present petition for certiorari, respondent respectfully urges the following points:

1. The judgment of the Court of Appeals sought to be reviewed is a non-final judgment, and the issue involved is not of such fundamental importance as to warrant review by this Court at this stage.

2. The holding of the Court of Appeals sought to be reviewed is one involving questions of local state law, is consistent with the holdings of the New York courts upon the same questions, and is therefore not appropriate for review by this Court.

3. In any event, the decision of the Court of Appeals in reversing the judgment upon the grounds stated is clearly correct.

4. No conflict of decisions, and no important question of Federal law is involved.

POINT I.

The judgment of the Court of Appeals sought to be reviewed is a non-final judgment, and the issue involved is not of such fundamental importance as to warrant review by this Court at this stage.

The judgment of the Court of Appeals for the Second Circuit which the petition seeks to have this Court review by *certiorari* was not a final judgment. It reversed the judgment for plaintiff entered in the District Court as stated in the petition, but it also remanded the cause to that Court for a new trial. It is not, therefore, a final judgment.

That this Court has power to review such a non-final judgment in a proper case is unquestioned, but as Mr. Justice GRAY stated in an opinion which has been adhered to consistently since 1893,

> "* * * this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Company* v. *Jacksonville, Tampa and Key West Ry. Co.* (1893), 148 U. S. 372, 384.

This Court has consistently held since then that it will not grant *certiorari* to review a judgment of the Courts of Appeals remanding a cause for trial in the absence of extraordinary circumstances. *Cf. Land* v. *Dollar*, 330 U. S. 731, 734; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685.

It is respectfully submitted that nothing in the opinion of the Court of Appeals has created or will create such an "extraordinary inconvenience and embarrassment in the conduct of the cause" as to warrant the intervention of this Court before a new trial is had.

POINT II.

The holding of the Court of Appeals sought to be reviewed is one involving issues of local state law only, is consistent with the holdings of the New York courts upon the same questions, and is therefore not appropriate for review by this Court.

The Court of Appeals reversed the judgment of the trial court upon the sole ground that the Court's charge on the effect of the *res ipsa loquitur* doctrine was "patently in error" under New York law. The Court held, as a preliminary matter, that under the New York conflict of laws rule, a New York court would apply its own *res ipsa* rule in a case tried before it arising out of an out-of-state tort.

In so holding, the Court of Appeals relied upon *Foltis* v. *City of New York*, 287 N. Y. 108, 119, 122, 38 N. E. 2d 455, 153 A. L. R. 1122; *Griffin* v. *New York Central R. Co.*, 277 App. Div. 320, 323, 98 N. Y. S. 2d 346; *Judd* v. *Sams*, 270 App. Div. 981, 62 N. Y. S. 2d 678; *Wright* v. *Palmison*, 237 App. Div. 22, 260 N. Y. S. 812; and *Clark* v. *Harnischfeger Sales Corp.*, 238 App. Div. 493, 264 N. Y. S. 873.

None of these cases has ever been questioned in the New York courts.

In deciding the question before it, the Court of Appeals of course was required to follow New York law. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487.

Petitioner's argument is based upon the theory that the Court of Appeals "misapprehended" the effect of the New York decisions.

It is respectfully submitted that it is the settled policy of this Court to accept the findings of Courts of Appeal on

questions of local law except upon a showing of "plain error". Even upon the showing made by petitioner, nothing more is involved here than a difference of opinion between the Court of Appeals and petitioner as to the meaning and purport of the New York cases.

In *Palmer* v. *Hoffman*, 318 U. S. 109, 118, the question arose as to whether the Court of Appeals had applied the New York conflict of laws rule correctly. This Court said:

> "* * *. The propriety of applying this rule of the *Fitzpatrick* case to the causes of action based on the Massachusetts statute may be arguable. But it is not the type of ruling under *Erie R. Co.* v. *Tompkins*, *supra*, which we will readily disturb. Where the lower federal courts are applying local law, we will not set aside their ruling except upon a plain showing of error."

In *Huddleston* v. *Dwyer*, 322 U. S. 232, this Court remanded a case to the Court of Appeals for further consideration of the local law upon a showing that a case upon which that court had relied had been overruled by the state court after the Court of Appeals decision. But this Court stated its general policy as follows (322 U. S. at p. 237):

> "* * *. The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. *Ruhlin* v. *New York Life Ins. Co.*, *supra*."

See also:

Ragan v. *Merchants Transfer Co.*, 337 U. S. 530, 534:

> "* * *. We ordinarily accept the determination of local law by the Court of Appeals (see *Huddleston* v. *Dwyer*, 322 U. S. 232, 237), and we will not disturb it here."

Estate of Spiegel v. *Commissioner*, 335 U. S. 701, 708:

> "* * *. It would be wholly unprofitable for us to analyze Illinois cases upon the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based upon Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

Hillsborough v. *Cromwell*, 326 U. S. 620, 629, 630:

> "Petitioner makes an extended argument to the effect that [a particular state court case] is not a controlling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice'."

Not one of the New York cases cited by the Court of Appeals has ever been questioned, much less overruled, by any New York court. Petitioner has brought to the attention of this Court not one single New York case in which the principles enunciated in these cases has been held inapplicable to a case like the one at bar.

Petitioner briefed and argued his case intensively before the Court of Appeals. After its decision had been handed down, he filed a petition for rehearing (R., pp. 537-558) containing precisely the same arguments as he now presents here. The Court of Appeals, after considering that petition for more than a month, denied it summarily (R., p. 559).

Petitioner has had more than ample opportunity to present his arguments on New York law to the Court of Appeals for the Second Circuit. In the absence of extra-

ordinary circumstances which are not present here, it is respectfully submitted that the decision of that court should be and is final.

POINT III.

In any event the decision of the Court of Appeals in reversing the judgment upon the grounds stated was clearly correct.

Petitioner complains that the Court of Appeals misapprehended the New York law. Nothing in his brief supports that contention.

The Court of Appeals relied upon *Judd* v. *Sams*, 270 App. Div. 981, aff'd 296 N. Y. 801, in holding that in New York the doctrine of *res ipsa loquitur* is procedural.*

Petitioner says that case is inapplicable because "it was not a *res ipsa* case at all" (Brief, pp. 28, 29). But the New York court's opinion says:

> "*Assuming* that the rule of *res ipsa loquitur* applied * * *. The rule itself is really a procedural one." (Our italics.)

Petitioner cites no New York case holding *res ipsa* to be substantive in any sense. He claims, however, that the "indications" are that the New York courts would hold it substantive for the purpose of conflict of laws. For this proposition he cites, as he did in the Court of Appeals, *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127, which is, he says,

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* The Court might also have quoted the New York Court of Appeals: "* * *. The time has come to attempt authoritative formulation of the procedural rule [of *res ipsa loquitur*] * * *." *Foltis* v. *City of New York*, 287 N. Y. 108, 121.

> "* * * a recognition, by the New York Court of Appeals, of the appropriate *conflict-of-laws characterization*, even of contributory negligence, as a substantive proposition." (Brief, p. 30.)

It is difficult to avoid characterizing this statement as either a wilful misinterpretation of the *Fitzpatrick* case or a wholly inexcusable misunderstanding of its effect. The *Fitzpatrick* opinion itself states (252 N. Y. at pp. 134, 135):

> "* * *. As a mere matter of procedure, the plaintiff here [*i. e.* in New York] must prove his freedom from contributory negligence * * *. If the Ontario statute had merely dealt with the order of proof or burden of proof, * * *, we would have another question. *Under such circumstances, our courts might feel called upon to apply our own rule.* * * * This point, however, we need not pass upon at this time. As we have said, the Ontario act goes beyond a mere matter of procedure * * *." (Our italics.)

This Court has itself interpreted the *Fitzpatrick* case in precisely the opposite sense from that so confidently asserted here by petitioner. In *Palmer* v. *Hoffman*, 318 U. S. 108, this Court had before it the question of the proper interpretation of the New York conflict of laws rule with respect to burden of proof of contributory negligence. It there stated (318 U. S. at pp. 118, 119):

> "* * * The court below did not distinguish between the conflict of laws rule in a case like the *Fitzpatrick* case and the rule which apparently obtains in cases where the foreign cause of action is not founded on such a statute. It was intimated in the *Fitzpatrick* case (252 N. Y. p. 135) and stated in other cases in New York's intermediate appellate courts (*Wright* v. *Palmison*, 237 App. Div. 22, 260 N. Y. S. 812; *Clark* v. *Harnischfeger Sales Corp.*, 238

> App. Div. 493, 495, 264 N. Y. S. 873) that in the latter situation the burden of proving freedom from contributory negligence is on the plaintiff. [i. e., that the New York rule applies]. *Fitzpatrick* v. *International Ry. Co.*, supra, p. 134."

Moreover, petitioner wholly ignores two cases cited by the Second Circuit Court of Appeals which hold specifically and without any possibility of misinterpretation that in New York the question of burden of proof of contributory negligence is one to be decided by the law of the forum. *Clark* v. *Harnischfeger Sales Corp.*, 238 App. Div. 493; *Wright* v. *Palmison*, 237 App. Div. 22. Both of those cases were decided after the *Fitzpatrick* case (indeed, the *Wright* case cites the *Fitzpatrick* case). Both were cited by this Court in *Palmer* v. *Hoffman, supra,* as "stating" what the *Fitzpatrick* case "intimated". Both were cited by the Court of Appeals in this case. Petitioner's brief wholly ignores them.

It is perfectly clear, therefore, that the Court of Appeals was correct in holding that the New York courts would consider *res ipsa loquitur,* like contributory negligence, a matter for the law of the forum; and it is equally clear that petitioner has made absolutely no showing to the contrary.

We turn to a consideration of the holding of the Court of Appeals that the trial court's charge on *res ipsa* was "patently in error" under New York law.

We may profitably look to petitioner's brief for a conclusive demonstration of the correctness of that holding.

On pages 26 and 27 of his brief, petitioner quotes a portion of the charge of the trial court in the case of *Griffin* v. *New York Central R. Co.*, which was reversed on appeal by the Appellate Division (277 App. Div. 320) on the basis of error in the charge. The Appellate Division opinion

was cited by the court below in support of its holding that the trial court's charge here was "patently in error".

Petitioner states that the first part of the *Griffin* charge, which he quotes, and which is substantially identical to the charge in this case, was directed "to the first cause of action" and that "There was no criticism of the instructions as to the first cause of action." (Brief, pp. 26, 27.)

These statements are wholly incorrect. As appears from the Appellate Division opinion, and even more clearly in the *Griffin* record on appeal, the defendant there conceded liability as to the first cause of action.* The charge of *res ipsa, in its entirety,* was devoted to the second cause of action. It was held error, *in its entirety.*

Petitioner maintains (Brief, p. 27) that the trial judge here, by charging that the plaintiff must "sustain the burden" of proving negligence, avoided the error in the *Griffin* charge—but the *Griffin* charge stated the same thing in even stronger terms (as the excerpt at the top of page 27 of petitioner's brief shows), and that charge was still held to be error!

It is also significant that in both the *Foltis* and *Griffin* cases cited by the Court of Appeals, the New York courts had before them the precise question involved here—the meaning and effect of the *res ipsa* doctrine in New York law.

Petitioner cites six cases, decided subsequent to the *Foltis* case, in which, he infers, "instructions, in substance the same as those given by the trial judge in this case,

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* The charge, referring to the first cause of action, stated: "For that accident, the railroad company here, the defendant, has conceded that it is liable so that you have no question here of negligence in that case at all."

were explicitly approved by the New York Court of Appeals, in overruling exceptions precisely directed to the points here again in issue".

The inference is wholly false. In not one of the opinions written by the New York appellate courts in those cases is there any ruling whatever on the point involved here. As a matter of fact, in three of the six cases (*Nickisch, Hallett* and *Beinhocker*), the New York Court of Appeals wrote no opinion. In the *Nickisch* and *Beinhocker* cases, the Appellate Division wrote no opinion.

Moreover, an examination of the records on appeal in all six of the cases reveals an astonishing fact: Despite the fact that, as petitioner points out, exceptions were taken to certain portions of the trial courts' charges, *in not one single case were those exceptions made the basis of the appeal or even argued on the appeal.* In every one of the cases cited, the question argued on appeal was whether the doctrine of *res ipsa* was applicable at all. The Court of Appeals, in each of the cases, did indeed hold (either explicitly or implicitly) that the trial court "correctly charged the jury * * * that the doctrine of *res ipsa loquitur* was applicable".

But in not one of the cases did it hold, as petitioner indicates it did, that the doctrine itself was correctly charged. That point was not before it.

In two of the cases decided by lower courts *and not by juries* (*Nickisch* and *Neuhoff*), the defendants rested without offering any evidence. In those two cases, the trial courts, deciding the law and the facts, held that plaintiffs had made out *prima facie* cases as a matter of law, and that as a matter of fact the inference of negligence was justified in the absence of any evidence by defendants. Nothing in those holdings conflicts with the Court of Appeal's holding here.

Petitioner has wholly failed to show that the *Griffin* case, cited by the Court of Appeals, is not good New York law. He has demonstrated that a charge practically identical to the one given here was specifically held to be erroneous by the New York Appellate Court in the *Griffin* case. He has not cited a single opinion by the New York Court of Appeals—or any other New York Appellate Court subsequent to the *Foltis* case—which in any way, either directly or by necessary inference, conflicts with the opinion of the Court of Appeals sought to be reviewed here. There are no such cases in the New York courts.

The decision of the Court of Appeals was clearly correct.

POINT IV.

No conflict of decisions, and no important question of federal law is involved.

Petitioner maintains that the decision below is "in conflict with the decisions of another Court of Appeals on the same matter". (Petition, pp. 3, 4.)

The matter involved is the correct interpretation of New York law. Petitioner cites no cases from other circuits holding that *res ipsa loquitur* is "substantive" in New York. It is not for the Courts of Appeal to decide *sua sponte* whether a given subject is "substantive" or "procedural". They must follow the local law. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 497. Nor has petitioner cited a single Court of Appeals case interpreting the New York law of *res ipsa* in a way in conflict with the Court of Appeal's opinion here.

Petitioner's contentions that the Court of Appeals "has decided an important question of federal law which has not been, but should be settled by this court" (Petition, p. 5),

and that the Court of Appeals "'has decided a federal question'—*i. e.*, the true conflict of laws nature of the *res ipsa* principle—'in a way probably in conflict with the applicable decisions of this court'" (Petition, p. 6) are also wholly without merit. The "conflict of laws nature of the *res ipsa* principle" is a question for State, and not Federal law. *Klaxon Co.* v. *Stentor Co., supra.*

Petitioner's final point—that the Court of Appeals "has sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision"—is so plainly frivolous as to require little comment.

Petitioner fears that, upon the new trial, the District Court may feel constrained to charge in accordance with the opinion of the Court of Appeals, which quotes from an opinion of a New York court.

His argument seems to be that because the Court of Appeals interpreted that opinion in a manner differing from his own interpretation, it is necessarily wrong, and that this Court should direct it to pay more heed to his opinions. Such self righteousness is hardly an adequate substitute for valid argument on the law.

Conclusion.

The petition for certiorari to the Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

AMERICAN AIRLINES, INC., *Respondent,*

By WILLIAM J. JUNKERMAN,
Counsel for Respondent.

DOUGLAS B. BOWRING,
Of Counsel.

Office - Supreme Court, U.
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No. 535

MERVYN J. LOBEL,

Petitioner,

against

AMERICAN AIRLINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

JAY LEO ROTHSCHILD,
Attorney for Petitioner.

INDEX

PAGE

I—The law of New York is plain and clear. No criticism is made of the *Foltis* case. The *Foltis* case has no application. The *Plumb* case states the New York law here applicable, as it was before, and has remained since, the *Foltis* case ... 1

II—No New York authority settles New York's conflict-of-laws policy. Intermediate decisions as to contributory negligence have no application ... 3

CONCLUSION 4

TABLE OF CASES

Beinhocker v. Barnes Development Corp., 296 N. Y. 925 2

Clark v. Harnischfeger Sales Corp., 238 App. Div. 493 3

Dittiger v. Isal Realty Corp., 290 N. Y. 492 2

Erie v. Tompkins, 304 U. S. 64 4

Fitzpatrick v. International Ry. Co., 252 N. Y. 127 .. 3

Foltis v. City of New York, 287 N. Y. 108 ..... 1, 2, 3

Griffin v. New York Central R. R. Co., 277 App. Div. 320 2

Palmer v. Hoffman, 318 U. S. 108 3

Plumb v. Richmond, etc., 233 N. Y. 285 3

Schroeder v. City & County Savings Bank of Albany, 293 N. Y. 370 1

Wright v. Palmison, 237 App. Div. 22 3

PETITIONER'S REPLY BRIEF

This reply brief is submitted to correct respondent's mistaken observations.

I.

The law of New York is plain and clear. No criticism is made of the *Foltis* case. The *Foltis* case has no application. The *Plumb* case states the New York law here applicable, as it was before, and has remained since, the *Foltis* case.

At page 12 of its brief, respondent states that, in none of the six New York Court of Appeals cases, subsequent to the *Foltis* case (upon which cases we rely [our main brief, pp. 14-19]), were the "*exceptions made the basis of the appeal or even argued on the appeal*" (italics respondent's), and that "*in not one of the cases did it* [the New York Court of Appeals] *hold as petitioner indicates it did, that the doctrine itself was correctly charged. That point was not before it*" (italics respondent's). It is significant that respondent, though thus meticulous in its distinction between general application of the *res ipsa* doctrine, and its specific statement, in the said six cases, does not attempt any denial of the undoubted fact that it did not, during the trial, take any appropriate exception as to the phraseology or substance of the charge given by the trial judge, as distinguished from the general application of the doctrine itself.

Furthermore, the fact as to what was decided in the said six cases, is otherwise than as now argued by respondent:

At page 92 of the appellant's brief in *Schroeder* v. *City & County Savings Bank of Albany* (293 N. Y. 370—quoted, our main brief, pp. 15-16), the very excerpt quoted under Subdivision (A), at page 15 of our main brief, is quoted and is the subject of contention that the court's instructions were error. And, at page 93 of the same brief in the *Schroeder* case, the instruction as quoted by us, under Subdivision (B), at page 16 of our main brief, is similarly the basis of contention that there was error. At page 32 of the respondent's brief, in the *Schroeder* case, it was

argued, as against these contentions, that "The jury was entitled to infer from the failure of defendants to go forward with the proof * * * that the collapse of the barricade was due to their negligence."

Accordingly, the issue here involved was squarely presented, argued and decided.

In *Dittiger* v. *Isal Realty Corp.* (290 N. Y. 492—quoted in our main brief, pp. 16-17), the appellant's brief, at pages 9 to 15, discusses the relevant authorities, and is in point. The opinion itself is too clear for debate.

In *Beinhocker* v. *Barnes Development Corp.* (296 N. Y. 925—quoted, our main brief, p. 19), the issue here involved was the burden of the appellant's entire "Third Point" (appellant's brief, pp. 33 ff.). Respondent, in that case, argued the proposition at page 17 of his brief. As appears therefrom, the trial court charged that the casualty afforded "reasonable evidence in the absence of a satisfactory explanation."

The other cases (as do those as to which the aforesaid particular observations have been made) all necessarily decided the issue here presented. Respondent's statement that in *Griffin* v. *New York Central R. R. Co.* (277 App. Div. 320), the court's instructions were "held error, *in its entirety*" (italics respondent's), will not bear analysis. The Appellate Division's own observation that it would not be "meticulous about the use of the word 'presumption' instead of the word 'inference'", negates respondent's unfounded characterization of what was decided in the *Griffin* case.

It does not meet the issue, for respondent to observe, as it does, that "Not one of the New York cases cited by the Court of Appeals has ever been questioned, much less overruled, by any New York court" (p. 7), or that petitioner "has not cited a single opinion by the New York Court of Appeals—or any other New York Appellate Court subsequent to the *Foltis* case—which in any way, either directly or by necessary inference, conflicts with the opinion of the

Court of Appeals sought to be reviewed here" (p. 13). We do not question *Foltis* v. *City of New York* (287 N. Y. 108), which does no more than decide that, ordinarily, there may not, in a *res ipsa* case, be a *directed* verdict for the plaintiff, and which has no application to the case at bar. The point is that the *Foltis* case does not overrule or question *Plumb* v. *Richmond, etc.* (233 N. Y. 285), which was the law before the *Foltis* case, and states the law of the case at bar, as it has been uniformly recognized and stated by the New York Courts, since the *Foltis* case.

II.

No New York authority settles New York's conflict-of-laws policy. Intermediate decisions as to contributory negligence have no application.

Insofar as the conflict-of-laws phase of this case is involved, it is enough to emphasize that there is no decision of any New York court, supporting the decision of the U. S. Court of Appeals; furthermore, that there is a New York Court of Appeals dictum, even in the field of contributory negligence (*Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127), pointing the other way; that the decisions of the intermediate New York Appellate Divisions, on contributory negligence, are without force, because the *res ipsa principle* does not involve a mere shifting of burden of proof, as does contributory negligence*, but creates a substantive right, where, otherwise, there would be none; that this court has never considered the *res ipsa* problem in this connection, though it has taken note of intermediate Appellate Division decisions as to contributory negligence (*Palmer* v. *Hoffman*, 318 U. S. 108, citing *Wright* v. *Palmison*, 237 App. Div. 22; *Clark* v. *Harnischfeger Sales Corp.*, 238 App. Div. 493); and that *res ipsa* decisions, in other

* In the *Fitzpatrick* case, the New York Court of Appeals said that "If the Ontario statute had merely dealt with the order of proof or burden of proof * * * we would have another question" (pp. 134-5).

circuits, arising from accidents in different jurisdictions, are to the contrary of the U. S. Court of Appeals decision here sought to be reviewed.

The basic issues here are as to whether, under the *Erie* v. *Tompkins* principle, *plain* New York law, as to the essentials of the *res ipsa* principle, may be disregarded, and New York policy, in the field of conflict-of-laws, anticipated and formulated for it, by a federal court. *A defendant, having gone forward with proof, should not be immunized against any unfavorable inference resulting from its lack of candor in doing so.*

Such exceptional issues, we submit, justify the granting of certiorari, to the end that the *settled* law of New York may be respected, and New York permitted to formulate and express its own principles of conflict of laws. *A fortiori,* in the absence of appropriate exception by respondent!

CONCLUSION

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to review its judgment.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Attorney for Petitioner.